IN THE
SUPREME COURT OF MISSOURI

Supreme Court No. SC92793

Eastern District Appeal No. ED96532

MADONNA FARROW

Plaintiff / Appellant,

v.

SAINT FRANCIS MEDICAL CENTER and CEDRIC C. STRANGE

Defendants / Respondents.

On Transfer from the Missouri Court of Appeals
For the
Eastern District of Missouri

APPELLANT'S SUBSTITUTE BRIEF

RIEZMAN BERGER, P.C.

Charles S. Kramer, #34416
Joseph D. Schneider, #57484
7700 Bonhomme Avenue, 7th Floor
St. Louis, MO 63105
(314) 727-0101
(314) 727-6458 (fax)

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

[1] Unless noted otherwise, all statutory cites are to the Revised Code of Missouri 2000, as updated through the 2010 Cummulative Supplement.

Missouri Code of State Regulations

Missouri Rules of Civil Procedure

Additional Sources

JURISDICTIONAL STATEMENT

Farrow appeals from a Summary Judgment entered by the Circuit Court of Cape Girardeau County on February 17, 2011, in favor of Respondents Saint Francis Medical Center ("St. Francis") and Cedric C. Strange ("Strange").

Farrow appealed the trial court's ruling. The Court of Appeals for the Eastern District affirmed the ruling of the trial court on February 14, 2012. Farrow filed a Motion for Rehearing and/or Application for Transfer to the Supreme Court of Missouri on February 29, 2012. The Court of Appeals then withdrew its prior opinion, and issued a new opinion on June 26, 2012, declaring the Motion for Rehearing or Transfer moot. Farrow then filed a Motion for Rehearing and/or Application for Transfer to this Court with the Court of Appeals with respect to its new opinion on July 7, 2012, which was denied on August 7, 2012.

Farrow then filed an Application for Transfer with this Court, which was granted on October 30, 2012.

This Court has jurisdiction to hear this case pursuant to Article V, Section 10 of the Missouri Constitution as this Court ordered transfer after opinion by the Eastern District Court of Appeals. See Mo. Const. art. V, § 10 (amended 1976); Rule 83.04.

STATEMENT OF FACTS

Appellant Madonna Farrow ("Farrow") is a female who, at all times relevant to this matter, resided in Cape Girardeau, Missouri. [Legal File ("L.F.") 7, ¶1]. Since 1987, she has been a licensed, Registered Nurse, in good standing [L.F. 325, ¶3]. In 1991, Respondent Saint Francis Medical Center ("Saint Francis") hired Farrow as a staff nurse, with her primary area of responsibility being the hospital's progressive cardiac floor. [L.F. 9, ¶12]. Respondent St. Francis is a not-for-profit corporation. [L.F. 58, 66-72, 73]. Article IV of Saint Francis' Articles of Incorporation, states that Saint Francis "shall have no capital stock and no dividends or pecuniary profits shall be declared or paid to any individual or individuals, firms or corporations whatsoever." [L.F. 68]. Article I, Section 4 of its Bylaws states that Saint Francis is "organized without capital stock and no part of [its] net earnings . . . shall inure to the benefit of or be distributable to the benefit of any Director, Officer, or private individual. . ." [L.F. 91]. Article IV, Section 5 of Saint Francis' Bylaws states that "[t]he President and Chief Executive Officer shall be responsible for operating [Saint Francis], managing all of its activities and conserving all of its resources. These responsibilities shall include exercising full executive authority over all [Saint Francis] activities and services . . ." [L.F. 101].

In August 1999, Farrow transferred to Saint Francis' radiology department where she continued to work, along with working overtime in other departments, without incident through December 2005. [L.F. 9-10, ¶16-17]. Prior to 2004, Saint Francis utilized outside nurses to insert peripherally inserted central catheters ("PICC lines") when patients needed such treatment. [L.F. 10, ¶18]. During 2004, Farrow suggested

that Saint Francis implement a program through which its own employee nurses would take over inserting such PICC lines into patients. [L.F. 10, ¶18]. Saint Francis agreed and assigned Farrow the responsibility of learning the procedure, as well as training other nurses in the procedure. [L.F. 10, ¶19-21]. Farrow developed and oversaw a PICC Line procedure program for Saint Francis and trained other nurses on the process, thereby establishing a program which increased patient treatment efficiencies and reduced patient costs [L.F. 10, ¶19-21], and furthered her reputation as a knowledgeable employee who cared about the welfare of the patients. [L.F. 10, ¶21].

As of December 2005, Farrow had worked as a nurse for Saint Francis for fourteen years without any complaints, write-ups or reprimands. [L.F. 10, ¶17]. In December 2005, Respondent Strange, the Director of Radiology for Saint Francis, approached Farrow in a doctor's ready room during work hours and indicated he wanted to have an affair. [L.F. 11, ¶23]. Farrow declined and attempted to laugh away the comments, which made Strange angry. [L.F. 11, ¶24]. Farrow advised Strange that she thought he was kidding, that his comments were inappropriate, and that his anger was making her uncomfortable, and left the room. [L.F. 11, ¶25]. Farrow reported the incident to Saint Francis' Human Resources Department and thereafter attempted to avoid working directly with Strange. [L.F. 11, ¶27].

However, in February 2006, Farrow again had contact with Strange when a radiology technician requested her assistance during an emergency angiogram involving one of Strange's patients. [L.F. 11, ¶29]. Farrow assisted Strange but was paged, in midprocedure, by another doctor, Frank Braxton ("Braxton"). [L.F. 11, ¶30]. Strange

agreed that Farrow should take the call from Braxton and she did so. Id. Braxton is an African American. [L.F. 12, ¶32]. After Farrow hung up the phone and returned to the patient's bed, Strange moved close to Farrow and whispered, "I understand now. You like the black stuff better than the white." [L.F. 12, ¶31]. Again, Farrow informed Strange that his comment was inappropriate and the she did not appreciate it, she had been purposely staying away from him, and that she wanted to be left alone. [L.F. 12, ¶33]. Farrow requested that another nurse take over for her and she left the room. Id. Farrow then informed Eric Bandon ("Bandon"), Saint Francis' Director of Imaging Services (the supervisor of radiology) of both unwanted advances by Strange, that they made her uncomfortable and made it difficult to work with Strange, and requested his assistance. [L.F. 12, ¶34]. Bandon said he would get back to her, but Farrow did not hear from Bandon or any other representative of Saint Francis. [L.F. 12, ¶36].

Instead, Farrow became subject to retaliation by Strange and Saint Francis designed to force Farrow to quit. [L.F. 12-13, ¶37-40]. Knowing her role and attachment to the PICC program she had developed and which she oversaw, Respondents retaliated by prohibiting Farrow from performing PICC Line procedures within Saint Francis' radiology department, and from teaching other nurses how do to such procedures, dictating that neither Farrow nor any of the nurses be allowed to perform PICC Line procedures. Id. Instead, Strange and Saint Francis insisted that Chuck Barwick, a non-nurse medical technician from Strange's private practice, be the point person. [L.F. 12-13, 37-40, 325, ¶4, 6]. Barwick was a physician assistant and was not a nurse or physician, however [L.F. 325, ¶5]. Farrow objected to the use of persons not authorized

by law to administer PICC lines [L.F. 28-30, ¶110-118]. Farrow complained that Saint Francis' retaliatory actions to remove her and her nurses from the PICC Line program would adversely impact patient care and her ability to assist in the delivery of a healthcare plan for Saint Francis patients if unauthorized persons took their place. [L.F. 28-30, ¶110-118]. Farrow attempted to continue to have herself or other nurses perform the PICC line procedures in radiology and complained about the change and also complained about the Respondents failure to follow hospital regulations and procedures in implementing the change. [L.F. 28-30, ¶110-118].

The Nursing Practices Act of Missouri law and regulations thereunder set forth a clear mandate of public policy that Farrow object to and not allow the changes in Saint Francis' PICC line program or the related impact on patient care. [L.F. 28-30, ¶115-118]. Farrow's efforts in complaining about the changes to the PICC line program and in seeking reinstatement of the use of nurses to administer PICC Lines was her duty as a member of the nursing profession in the State of Missouri. [L.F. 28-30, ¶115-118]. Farrow also had an affirmative duty to do so pursuant to Saint Francis' own policy regarding "Compliance Reporting." [L.F. 319].

In addition to the removal of Farrow and the nurses she'd trained from the PICC line procedure, Strange also retaliated by falsely complaining that Farrow was not writing the activity of the day on the board, and not following orders; openly advocated to other employees and staff of Saint Francis that Farrow should be fired; falsely accused Farrow of changing Doctor's order and ignoring his instructions; and berated, yelled at, intimidated and harassed Farrow in front of others. [L.F. 13, ¶38]. Saint Francis also

retaliated by acquiescing to Strange's retaliatory actions, and manufacturing undeserved and unnecessary write-ups and reprimands against Farrow due to the demands of Strange [L.F. 13, ¶39], and by agreeing to Strange's demand that Farrow be removed from the PICC line program and allowing non-nurses to take over the insertions [L.F. 13, ¶40]; allowing Strange to verbally berate and abuse Farrow in front of others [L.F. 14, ¶40]; summoning Farrow to a closed door meeting in which Strange was allowed to yell and berate her. [L.F. 14, ¶40]. Saint Francis also did not dispute a statement by Strange that he could get Farrow out of Saint Francis' employ unless she "did what he told her to do," and Saint Francis then wrote up Farrow for alleged matters that had occurred long before without any prior concern, and were not violations of any policy or instruction [L.F. 14, ¶40-41]. Saint Francis further retaliated against Farrow by imposing unwarranted disciplinary actions despite her attempts to continue to provide quality care to the patients. [L.F. 12-13, ¶ 38.]

Farrow approached Saint Francis' Human Resources Department after the retaliation began and inquired as to what she could do. [L.F. 14, ¶42]. She was told she could put documentation into her personnel file. [L.F. 14, ¶42]. On October 16, 2006, Farrow placed documentation into her personnel file pertaining to Strange's unwanted advances, the retaliatory acts of Strange and others, and her requests for assistance. [L.F. 14, ¶43]. Saint Francis then took retaliatory steps to remove and replace Farrow, despite her prior years of exemplary service without complaint, by specifically indicating to other doctors that, with reference to Farrow, they were trying to "get her out." [L.F. 14, ¶41].

Farrow suffered anxiety, nervousness, sleep deprivation and insomnia as a result of the above actions, requiring medical care and medication, causing her to miss work. [L.F. 14-15, ¶44]. When she learned of the plans to terminate her, she was forced to request a transfer from radiology back to the progressive cardiac floor, which resulted in a pay loss of almost $2.00 per hour. [L.F. 14-15, ¶44]. Further, although Saint Francis agreed to the transfer, her new supervisor on the cardiac floor, Linda Schlick ("Schlick") told her she had been apprised of the "problems in radiology," that Farrow must not make any more complaints about it, and that Farrow had to just keep her head down and do her job. [L.F. 15, ¶45].

Continuing to suffer from concerns about her job, however, Farrow placed additional documentation into her personnel file in January 2007 regarding the prior acts of Strange and Saint Francis. [L.F. 15, ¶46]. A few weeks later, Steven Bjelich ("Bjelich"), Saint Francis' President/CEO, approached Farrow, acknowledged he was personally aware of her transfer and inquired as to whether it had "worked out her problems." [L.F. 15, ¶47]. Farrow informed Bjelich that she was still continuing to have sleep difficulties as a result of the way she had been treated by Strange and Saint Francis, that she still wanted the matter investigated, informed Bjelich that she had everything documented in her personnel file and specifically requested that Bjelich investigate and review her file and documentation. [L.F. 15, ¶48]. Bjelich indicated Saint Francis would review the matter and her file. [L.F. 15, ¶49]. However, neither Bjelich nor any other representative reviewed the matter and her file. [L.F. 15-16, ¶49]. Farrow then heard nothing further from Bjelich until April of 2007, when he again spoke with her in the

hallway. [L.F. 16, ¶50]. At that time, Bjelich again inquired whether she was "sleeping better." [L.F. 16]. Farrow again indicated she was still having sleep issues, and asked if Saint Francis had investigated and whether he had reviewed the materials in her personnel file. [L.F. 16, ¶52]. Bjelich indicated he had not "yet" reviewed her file, but would do so. [L.F. 16]. However, Farrow again never heard back from Saint Francis about any such review or any investigation. [L.F. 16, ¶53].

Then, on May 16, 2008, Farrow was summoned to her supervisor's office without any triggering incident, and was advised that she was being written up for "unprofessional conduct", allegedly based on her having a "negative attitude," but without any specific details provided. [L.F. 16, ¶55]. Farrow was also told, out of the blue and out of context, by her supervisor that she (Farrow) should not worry about her personnel file so much and should not review it. [L.F. 16, ¶55].

Having the right to review her file at any time under Saint Francis' policies and troubled by the statement, Farrow went to Human Resources and checked her file and found that all of the documentation regarding Strange's advances and the retaliatory actions that had ensued had been removed from her file. [L.F. 16-17, ¶56]. Farrow complained to Human Resources, but received no response from Saint Francis and no action was taken. [L.F. 17, ¶57].

Then, within a couple weeks thereafter, Strange approached Farrow in the hallway and told her that he was "still going to get [her] out." [L.F. 17, ¶59]. Farrow reported Strange's renewed threat to Saint Francis' Human Resources. [L.F. 17, ¶60]. Once again, however, Saint Francis did not investigate. [L.F. 17, ¶61]. Rather, Saint Francis

further retaliated and attempted to cause Farrow to quit by labeling Farrow's complaints about the harassment and retaliation she had suffered in radiology as disruptive and non-productive behavior on her part. [L.F. 17, ¶62]. As a result of her prior complaints about such harassment and retaliation, Saint Francis changed Farrow's compensation agreement, stripping Farrow of hours and prohibiting her from working any overtime or floating to other departments, (indicating that any overtime work or floating would result in her termination), reducing Farrow's hours to less than forty (40) hours a week, and continuing to fail to investigate the advances and comments of Strange. [L.F. 17-18, ¶62]. Farrow refused to quit. [L.F. 18, ¶63].

Seeing that Farrow was not inclined to quit despite the reduction in pay and mistreatment, in August, 2008, Farrow was further disciplined, with her supervisor again specifically informing Farrow that despite the passage of time the discipline was at least partially due to her complaints about Strange and the retaliatory matters that had occurred in radiology. [L.F. 324].

Farrow still would not quit and, accordingly, Saint Francis directly terminated Farrow's employment by notice of termination on December 10, 2008. [L.F. 18, ¶64; 209, ¶4]. Saint Francis' notice of termination stated it was purportedly based on unspecified "failures to meet customer service expectations," even though any such issues would not be grounds for termination under Saint Francis' progressive discipline policy. [L.F. 18, ¶65; 209-222, ¶2]. Further, when Farrow asked her supervisor, Schlick, why she was being terminated, Schlick told Farrow that, notwithstanding what the notice read, her termination was actually because of the "problems in radiology and her

continuing bad attitude." [L.F. 18, ¶66]. When Farrow asked Terry Kreitzer ("Kreitzer") of Saint Francis' Human Resources department about her termination, Kreitzer elaborated by responding that Farrow was terminated because Saint Francis was concerned that Farrow was still pursuing the radiology issues and because Farrow had supposedly shown a letter from Jeannette Fadler ("Fadler"), Vice-President of Patient Care to others (which "others" and which supposed letter Kreitzer refused to identify). [L.F. 19, ¶67]. Saint Francis, through Kreitzer, also indicated to Farrow that the decision was final and nothing could be done. [L.F. 19, ¶68].

Farrow was aware that an internal appeal option existed but was not clear as to how the appeal was supposed to operate. [L.F. 209, ¶3-5]. She respectfully requested information on the appeal process but Saint Francis failed and refused to provide the information. [L.F. 210, ¶6-7] Saint Francis' Employee Fair Treatment Policy did not indicate whether an appeal of a termination decision would be processed in the same manner as a grievance for any other disciplinary action and implied it would not be. [L.F. 320-323]). Farrow requested Kreitzer to provide her with the information necessary to pursue an appeal despite the claim that the decision was final. [L.F. 19, ¶68; 209-210, ¶3-7]. In a separate and further act of retaliation, however, Kreitzer failed and refused to so, despite claiming that she would provide the information. Id. In fact, in further retaliation for her complaints about Strange's advances and his and Saint Francis' prior retaliation, Saint Francis refused to provide the procedures for an appeal to Farrow for over a month, only providing the same on or about January 9, 2009, [L.F. 19, ¶69; 210, ¶9]. This occurred after Farrow had attempted to pursue the post-termination

grievance/appeal process without knowing the procedures of the process. [L.F. 210, 214].

Once Farrow initiated the post-termination grievance/appeal process, Farrow diligently pursued the internal appeal remedies afforded to her by Saint Francis in relation to her wrongful employment termination. [L.F. 19, ¶70; 210, ¶7-9; 214-222]. However, Saint Francis again retaliated against her by refusing and failing to provide a true appellate review process: at no time during the supposed review of Farrow's termination was she interviewed or sent any written questions to answer [L.F. 205, 211, ¶13]; several witnesses to the incidents involved were neither interviewed nor asked for information [L.F. 206, 211, ¶13]; at no point in the supposed review of Farrow's termination was the fact that the termination was contrary to Saint Francis' own progressive discipline policy ever discussed [L.F. 211, ¶14]. Saint Francis continued to deny Farrow true review, but also continually informed her that each level of "decision" upholding her termination was subject to further appeal within internal systems, causing Farrow to delay seeking legal advice and to delay filing her charge with the EEOC and MHRC. [L.F. 211, ¶13-17].

Saint Francis ultimately responded to Farrow's last avenue of internal appeal on March 2, 2009 in a letter from the Hospital president, Bjelich, in which he stated that Farrow had never previously complained of the prior harassment, discrimination, or retaliation, [L.F. 205-206, 223] even though Farrow alleges that he knew that statement to be false. [L.F. 15-16]. Thereafter, Farrow contacted the Equal Employment Opportunity Commission ("EEOC") and Missouri Commission on Human Rights

("MCHR") to file her complaint arising from the aforementioned conduct of Saint Francis and Strange. [L.F. 20, ¶74; 211, ¶18].

Farrow met with an investigator who, although employed by the EEOC, was assigned to also investigate complaints on behalf of the Missouri Commission on Human Rights ("MHRC"). [L.F. 206, ¶18; 211, ¶19]. Farrow fully and completely reported all the material allegations set out in her First Amended Petition in this action to the agency investigator and provided him with all the details, beginning with Strange's first sexual proposition during December 2005 and her complaints about the same, and including the subsequent and continuing additional retaliation, harassment and discrimination detailed in the petition and her complaints about those actions, and including the retaliation, harassment and discrimination imposed upon her in the post-discharge appeal and grievance process. [L.F. 20, ¶74-75; 206, ¶19; 211-212, ¶20].

The agency investigator took down the complaints of Farrow, including those involving the internal appeal, determined what would be in the written charge, and prepared the Charge of Discrimination to be considered on behalf of the MCHR for her. [L.F. 20, ¶75; 212, ¶21]. Farrow relied on the investigator to include all of the pertinent information about her complaints in order to fully and properly process her charge of discrimination, as well as to check all necessary boxes and options. [L.F. 212, ¶21]. Farrow signed the complaint as completed for her and caused the same to be timely filed, checking the appropriate box for the matter to be considered by the MCHR. [L.F. 20, ¶76; 212, ¶21]. Subsequently, Saint Francis and Strange were notified of Farrow's complaint. [L.F. 20, ¶77; 42]. Respondents did not at any time object to the MHCR's

jurisdiction over the claim or seek a writ of prohibition to prevent the MHCR from proceeding. See generally, [L.F. 42-44]. The matter was before the EEOC and MCHR for some time, and the Respondents had ample opportunity to submit any positions or legal arguments to the agency relating to timeliness of filing, agency jurisdiction or whatever, but did not do so. Id. Eventually, on December 18, 2009, the MCHR issued its own, separate Right to Sue letter, notifying Farrow of her right to sue under State law. [L.F. 21, ¶78; 224]. In so doing, the MCHR implicitly and expressly found that all prerequisites to agency jurisdiction had been complied with and that it had jurisdiction, as such findings were required before a right to sue letter would issue. That the claims were timely, did not qualify as an "employer", or that Farrow's claim to the Agency was otherwise improper. [L.F. 21, ¶78; 224]. Upon being informed of the issuance of the Right to Sue letter by the MHCR, neither Respondent sought to appeal that determination or the implicit finding of agency jurisdiction. See generally, [L.F. 42-44]. Farrow thereafter filed the underlying lawsuit with the Circuit Court for Cape Girardeau County on March 18, 2010, which was within ninety (90) days of the issuance of the MCHR's Notice of Right to Sue, [L.F. 6, 224]. Farrow later filed an Amended Petition in the case on August 31, 2010. [L.F. 3, 7-36]. Saint Francis and Strange did not file any Answer or Affirmative Defenses to Farrow's Petition or Amended Petition. [L.F. 1-6]. Instead, they each responded by filing Motions to Dismiss, or in the Alternative, Motions for Summary Judgment on September 23, 2010. [L.F. 3, 37-153]. Those Motions, on their face, sought to dismiss most counts solely based on pleading standards. [L.F. 114-119]. The only argument expressly requesting summary judgment was the claim that Counts I-IV

were unfounded because St Francis was not an "employer" within the meaning of the anti-discrimination statutes.[2] [L.F. 117-118]. The Motions were fully briefed, [L.F. 2, 154-297], a hearing was held [L.F. 1], and Judge Lewis issued his "Judgment on Motions to Dismiss or, in the alternative, for Summary Judgment" on February 17, 2011[L.F. 1, 329-330]. The ruling did not contain any analysis or rationales and made no mention of the Motions to Dismiss, purporting to "grant judgment" on all claims. [L.F. 1, 329-330].

[2] As a result, neither Respondent presented any facts to the trial court which contested in any manner or to any degree any of the above-facts, which were set forth in the Amended Petition. They merely claimed that the truth of these allegations was irrelevant given their asserted arguments that the counts did not state a claim or were barred by the affirmative matters they raised.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT I OF HER FIRST AMENDED PETITION ALLEGING EMPLOYMENT DISCRIMINATION IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT, IN THAT THE CLAIM WAS PROPERLY PLEAD, ANY ARGUMENTS RELATING TO THE PRE-FILING PROCEEDINGS BEFORE THE MISSOURI COMMISSION ON HUMAN RIGHTS WERE NOT RAISED BEFORE THE AGENCY AND WERE NOT PROPERLY BEFORE THE COURT IN LIGHT OF *J.C.W. EX REL. WEBB V. WYCISKALLA*, AND THERE WERE, AT A MINIMUM, QUESTIONS OF FACT PRECLUDING JUDGMENT AS A MATTER OF LAW.

Alhalabi v. Missouri Dept. of Natural Resources, 300 S.W.3d 518, 524 (Mo. Ct. App. 2009)

Barekman v. City of Republic, 232 S.W.3d 675, 679 (Mo. Ct. App. 2007)

McCracken v. Walmart Stores East, L.C., 298 S.W.3d 473, 479 (Mo. 2009)

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009).

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT II OF HER FIRST AMENDED PETITION ALLEGING UNLAWFUL RETALIATION IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT, IN THAT THE CLAIM WAS PROPERLY PLEAD, ANY ARGUMENTS RELATING TO THE PRE-FILING PROCEEDINGS BEFORE THE

MISSOURI COMMISSION ON HUMAN RIGHTS WERE NOT RAISED BEFORE THE AGENCY AND WERE NOT PROPERLY BEFORE THE COURT IN LIGHT OF *J.C.W. EX REL. WEBB V. WYCISKALLA* AND THERE WERE, AT A MINIMUM, QUESTIONS OF FACT PRECLUDING JUDGMENT AS A MATTER OF LAW.

Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 245 (Mo. Ct. App. 2006)

Barekman v. City of Republic, 232 S.W.3d 675, 681 (Mo. Ct. App. 2007)

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT III OF HER FIRST AMENDED PETITION ALLEGING RETALIATORY DISCHARGE IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT IN THAT THE CLAIM WAS PROPERLY PLEAD, ANY ARGUMENTS RELATING TO THE PRE-FILING PROCEEDINGS BEFORE THE MISSOURI COMMISSION ON HUMAN RIGHTS WERE NOT RAISED BEFORE THE AGENCY AND WERE NOT PROPERLY BEFORE THE COURT IN LIGHT OF *J.C.W. EX REL. WEBB V. WYCISKALLA* AND THERE WERE, AT A MINIMUM, QUESTIONS OF FACT PRECLUDING JUDGMENT AS A MATTER OF LAW.

Barekman v. City of Republic, 232 S.W.3d 675, 681 (Mo. Ct. App. 2007).

J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo. banc 2009)

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 94 (Mo. 2010)

IV. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS ON FARROW'S SEPARATE PUBLIC POLICY EXCEPTION WRONGFUL DISCHARGE CLAIM (COUNT V IN HER FIRST AMENDED PETITION), IN THAT (A) THE RESPONDENTS HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE AND (D) FARROW WAS ENTITLED TO LEAVE TO AMEND HER CLAIM IN ANY EVENT.

Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 92 (Mo. 2010)

Kirk v. Mercy Hospital Tri-County, 851 S.W.2d 617, 622 (Mo. Ct. App. 1993)

Mo. Rev. Stat. 335.017

20 C.S.R. 2200-6.020

V. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT IV OF HER FIRST AMENDED PETITION ALLEGING SEPARATE DISCRIMINATION AND RETALIATION IN THE POST-DISCHARGE INTERNAL APPEAL PROCESS IN THAT RESPONDENTS HAD ONLY MOVED TO DISMISS THE SAME FOR FAILURE TO STATE A CLAIM, DISCRIMINATION BY AN EMPLOYER IN ITS INTERNAL POST-TERMINATION APPEAL PROCESS

IS ACTIONABLE UNDER THE MISSOURI HUMAN RIGHTS ACT, THE RIGHT TO SUE LETTER ISSUED BY THE MHRC WAS LEGALLY SUFFICIENT TO INCLUDE SUCH CLAIM, THE CLAIM WAS PROPERLY PLEAD, AND THE RECORD ESTABLISHED QUESTIONS OF FACT ON ALL ELEMENTS PRECLUDING SUMMARY JUDGMENT IN ANY EVENT.

Alhalabi v. Missouri Dept. of Natural Resources, 300 S.W.3d 518 (Mo. Ct. App. 2009)

Keeney v Hereford Concrete Prods. 911 S.W.2d 622, 625 (Mo. 1995)

Mo. Rev. Stat. 213.055.1 (1) (a)

Mo. Rev. Stat. 213.070 (1)

Mo. Rev. Stat. 213.101

VI. ASSUMING ARGUENDO THAT THE QUESTION OF THE TIMELINESS OF FARROW'S PRESENTATION OF HER CLAIM TO THE MISSOURI COMMISSION ON HUMAN RIGHTS WAS A MATTER FOR THE COURT TO GENERALLY CONSIDER, IT WOULD STILL HAVE BEEN ERROR FOR THE TRIAL COURT TO ENTER JUDGMENT AGAINST FARROW ON COUNTS I –IV OF HER AMENDED PETITION IN THAT QUESTIONS OF MATERIAL FACT WOULD HAVE STILL EXISTED AS TO WHETHER FARROW'S FILING WITH THE AGENCY WAS TIMELY AND, IF IT WERE NOT TIMELY FOR ANY REASON, WHETHER RESPONDENTS WERE ESTOPPED FROM RAISING, HAD WAIVED ANY RIGHT TO WAIVE, OR WERE OTHERWISE EQUITABLLY PRECLUDED FROM RAISING ANY INFIRMITY THAT MIGHT EXIST.

Evans v. Empire District Electric, 346 S.W.3D 313, 316-317 (Mo. Ct. App. 2011)

Giandinoto v. Chemir Electrical Services, 545 F.Supp.2d 952, 957 (E.D. Mo. 2007)

Pollock v. Wetterau, 11 S.W.3d 754 (Mo. Ct. App. 1999)

Thompson v. Western-South Life Insurance Co., 82 S.W.3d 203, 208 (Mo. Ct. App. 2002).

VII. ASSUMING ARGUENDO THAT THE QUESTION OF THE TIMELINESS OF FARROWS PRESENTATION OF HER CLAIM TO THE MISSOURI COMMISSION ON HUMAN RIGHTS WAS A MATTER FOR THE COURT TO GENERALLY CONSIDER EVEN THOUGH IT HAD NOT BEEN PRESENTED TO THE AGENCY, THAT RESPONDENTS HAD NOT WAIVED AND WERE NOT ESTOPPED OR EQUITABLY PRECLUDED FROM RAISING SUCH ARGUMENTS, AND IT WAS DETERMINED THAT FARROW HAD NOT TIMELY PRESENTED HER CLAIM TO THE AGENCY, THE TRIAL COURT WOULD STILL HAVE ERRED IN ENTERING JUDGMENT AGAINST FARROW ON COUNTS I, II, III AND IV OF HER AMENDED PETITION IN THAT THE MISSOURI PUBLIC POLICY OF ENCOURAGING RESORT TO INTERNAL APPEAL PROCEDURES BEFORE TURNING TO STATE AGENCIES OR COURTS WOULD MILITATE IN FAVOR OF A RULE OF LAW TOLLING THE TIME PERIOD FOR REPORTING DISCRIMINATION TO THE MCHR UNTIL AFTER ANY EMPLOYER-PROVIDED INTERNAL APPEAL PROCEDURE HAS BEEN COMPLETED.

Mo. Rev. Stat. 213.101

VIII. THE TRIAL COURT ERRED IN GRANTING MOTION FOR JUDGMENT IN FAVOR OF RESPONDENT STRANGE ON FARROW'S DEFAMATION CLAIM (COUNT VI IN HER FIRST AMENDED PETITION), IN THAT (A) STRANGE HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, AND (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE.

Diehl v. Fred Weber, Inc., 309 S.W.3d 309 (Mo. Ct. App. 2010)

Mo. Rev. Stat. 516.100

Mo. Rev. Stat. 516.140

IX. THE TRIAL COURT ERRED IN GRANTING STRANGE'S MOTION FOR SUMMARY JUDGMENT ON FARROW'S FALSE LIGHT INVASION OF PRIVACY CLAIM (COUNT VII IN HER FIRST AMENDED PETITION), IN THAT (A) STRANGE HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, AND (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD

PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE.

Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 323 (Mo. Ct. App. 2008)

Mo. Rev. Stat. 516.120(4)

X. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF STRANGE ON FARROW'S TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY CLAIM (COUNT VIII IN HER FIRST AMENDED PETITION), IN THAT (A) STRANGE HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, AND (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE.

Clinch v. Heartland Health, 187 S.W.3d 10, 14 (Mo. Ct. App. 2006)

Stehno v. Spring Spectrum L.P., 186 S.W.3d 247, 255 (Mo. banc 2006)

Topper v. Midwest Division Inc., 306 S.W.3d 112, 126 (Mo. Ct. App. 2010)

ARGUMENT

Standard of Review

In the instant case, the Respondents each filed a "Motion to Dismiss or in the Alternative for Summary Judgment." As noted above, only a few of the arguments asserted matters outside the pleadings and purported to seek summary judgment. Although the parties followed a summary judgment briefing schedule with respect to all arguments, the Respondents' arguments against Counts V, VI, VII and VIII of Farrow's Amended Petition challenged merely the adequacy of the pleadings and did not purport to assert any "evidence" in opposition to the claims – thus clearly establishing that they were seeking an order dismissing such claims rather than seeking summary judgment on such claims. Nonetheless, the Court below purported to grant summary judgment on all counts, and did not address any motion to dismiss criteria. [L.F. 330]. The Trial Court also did not offer any analysis for any of its rulings. Id.

Since the Order and Judgment rendered summary judgment, the standard of review for this court is the standard applicable to review of summary judgment, which is "de novo" review. Daugherty v. City of Maryland Heights, 231 S.W.3d 814, 818 (Mo. 2007). Summary Judgment is only appropriate where the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. Id. This Court reviews the record in the light most favorable to the party against whom judgment was entered. Id. The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment. Id. "Summary judgment

should seldom be used in employment discrimination cases, because such cases are inherently fact-based and often depend on inferences rather than on direct evidence." Id.

If the rulings of the trial court are construed as granting the motion to dismiss, the standard of review does not change. An appellate court reviews a trial court's grant of a motion to dismiss de novo as well. City of Lake St. Louis v. City of O'Fallon, 324 S.W.3d 756, 759 (Mo. banc 2010). However, "it will consider only the grounds raised in the motion to dismiss in reviewing the propriety of the trial court's dismissal of a petition, and, in so doing, it will not consider matters outside the pleadings." Id. "When [the] Court reviews the dismissal of a petition for failure to state a claim, the facts contained in the petition are treated as true and they are construed liberally in favor of the Plaintiff. If the petition sets forth any set of facts that, if proven, would entitle the Plaintiff to relief, then the petition states a claim." Brooks v. City of Sugar Creek, 340 S.W.3d 201, 211 (Mo. Ct. App. 2011), citing Lynch v. Lynch, 260 S.W.3d 834, 836 (Mo. banc 2008).

ANALYSIS

I. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT I OF HER FIRST AMENDED PETITION ALLEGING EMPLOYMENT DISCRIMINATION IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT, IN THAT THE CLAIM WAS PROPERLY PLEAD, ANY ARGUMENTS RELATING TO THE PRE-FILING PROCEEDINGS BEFORE THE MISSOURI COMMISSION ON HUMAN RIGHTS WERE NOT RAISED BEFORE THE AGENCY AND WERE NOT PROPERLY BEFORE THE COURT IN LIGHT OF

J.C.W. EX REL. WEBB V. WYCISKALLA AND THERE WERE, AT A MINIMUM, QUESTIONS OF FACT PRECLUDING JUDGMENT AS A MATTER OF LAW.

Standard of Review

As noted above, the standard of review is "de novo."

Argument

Count I of Farrow's Amended Petition alleged Respondents violated the Missouri Human Rights Act. [L.F. 21-24]. A review of the record reveals Farrow's claim was properly plead, and there are at least questions of fact on each element, thus precluding the granting of a motion to dismiss and/or judgment. For Farrow to prevail on Count I she needed to plead and ultimately prove: (1) she is a member of a protected group; (2) she was subjected to a discriminatory act; (3) her gender was a contributing factor in the discriminatory act; (4) a term, condition, or privilege of her employment was affected by the discriminatory act; and (5) the Respondents knew or should have known of the discriminatory act and failed to take appropriate action. *See* Barekman v. City of Republic, 232 S.W.3d 675, 679 (Mo. Ct. App. 2007), *see also* Missouri Approved Jury Instruction ("M.A.I.") 38.01. She must also show that she filed a complaint with the Missouri Commission on Human Rights for their investigation of same, was issued a letter indicating her right to bring a civil action, and initiated her action within ninety days of such notice. See Mo. Rev. Stat. §213.111. For her claims against Strange, she must additionally plead that Strange was her supervisor or co-worker, he oversaw and made decisions affecting her employment, he was subjecting Farrow to unwelcome sexual harassment, and her gender was a contributing factor in the harassment.

Barekman, 232 S.W.3d at 681; See e.g. Reed v. McDonald's Corp., 363 S.W.3d 134, 139 (Mo. Ct. App. 2012).

A review of Farrow's Amended Petition reveals all necessary elements were alleged. [L.F. 21-24, ¶81-92]; Daugherty, 231 S.W.3d at 818 (employment discrimination cases are inherently fact based). Indeed, as already noted, in the court below, Respondents did not contend otherwise. Moreover, Respondents filed their motions upon which judgment was entered without filing any answer or affirmative defenses or any discovery being conducted in the case [LF 1-6]. Respondents **did not assert any "evidence" to contradict the allegations**, thus **the allegations of Farrow were not contradicted and Summary Judgment was not proper.** Further, evidence put forth by Farrow in response to the Respondents' motions also established at least questions of fact on every element. *See* [L.F. 7 (¶1), 22 (¶84)] (Farrow is a female, and thus a member of a protected group); [L.F. 10-12, 21] (evidence of the discriminatory acts alleged); [L.F. 22, ¶87] (her gender was a contributing factor in the discriminatory act); [L.F. 22, ¶84] (terms, conditions, and privileges of employment were affected by the discriminatory act); [L.F. 22, ¶87] (Respondents knew or should have known of the discriminatory act and failed to take appropriate action); [L.F. 22, ¶87] (received right to sue letter from MHRC); [L.F. 8-9] (Saint Francis was her employer) and [L.F. 7-8 (¶5-6), 21 (¶82)] (Strange was supervisor).

Accordingly, recognizing that Farrow had properly alleged and could prove her prima facie case, Respondents based their challenge to this count on other grounds. Respondents challenged Farrow's exhaustion of administrative remedies, claiming that

the pre-filing agency complaint process had been defective and that such defect barred the current action --- arguments which ignored the impact of the Missouri Supreme Court holding in J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249 (Mo banc 2009). They also claimed that they were not an "Employer" within the meaning of the statute.

A. The "Defective Exhaustion of Remedies" Defense is Unavailing

In November 2009, this Court decided the case of J.C.W. ex rel. Webb v. Wyciskalla, and held that the subject matter jurisdiction of Missouri courts is governed by the Missouri Constitution, which provides the circuit courts with original jurisdiction over all cases and matters, civil and criminal, and that no statutory enactment can affect that jurisdiction. J.C.W. ex rel. Webb v. Wyciskalla, 275 S.W.3d 249, 254 (Mo. banc. 2009) (hereafter referred to as "Webb"). This Court also then held that statutory preconditions to judicial proceedings involving statutory claims are not jurisdictional, only prevent judicial remedy and not judicial jurisdiction. Id. The Webb Court also held that any such statutory preconditions to judicial remedy must be strictly construed, and must be specifically set out by statute and not by judicial fiat or construction. Webb, 257 S.W.3d at 255; See also, Alhalabi v. Missouri Dept. of Natural Resources, 300 S.W.3d 518, 524 (Mo. Ct. App. 2009). After Webb, any prerequisites to judicial proceeding previously imposed or recognized in case law "precedent" which are not actually specifically enumerated in the applicable statutes are no longer applicable. Any "precedent" which required compliance with judicially constructed or implied preconditions do not represent good law. Id. Only statutory preconditions must be met.

Applying Webb and its progeny to this case reveals the flaw in the Respondents arguments presented below. The only express statutory preconditions to a Missouri Court's ability to provide a forum and a remedy for a plaintiff's Missouri Human Rights Act violation claim are found in §213.111 RSMo. The only requirements imposed by that statute are: 1) a requirement that the plaintiff file a charge with the state agency prior to filing a state court action, 2) that the agency issue a right to sue letter, and 3) that the judicial case then be filed within 90 days of that right to sue letter. See 213.111 RSMO. Neither §213.111 nor any other law requires compliance with any particular procedural aspects of the agency proceedings as a precondition for judicial relief. Mo. Rev. Stat. §213.111 (including any precondition of a timely filing with the agency, so long as the agency believed it timely, still processed the claim, and issued the right to sue letter which is required by statute). To the extent any pre-Webb case law undertook a review of such matters or deemed them preconditions to, or even relevant to, the later judicial proceedings, such cases are no longer good law.

Respondents asserted to the Trial Court that Farrow had filed her complaint before the MHRC "late," notwithstanding the Agency's implicit finding of timeliness and jurisdiction through the issuance of its right to sue letter. However, as noted, a "timely filed with the Agency" requirement is not an express statutory prerequisite to the later judicial action. What is required by the statute is merely that the plaintiff files the complaint with the Agency and that the Agency accept and process the Complaint and then issue a right to sue letter. §213.111. That was done in this case. This makes sense, because Missouri law specifically provides that, if the timeliness of the original

administrative filing with the agency under Mo. Rev. Stat. §213.075 was to be contested by the parties, such matters had to be challenged before the agency. 8 C.S.R. 60-2.025(7)(B)(3), supra. Missouri law also specifies that if, after such a challenge was made before the Agency, the Respondents did not like the agency's determination with respect to it, or thought there was error in it, the Agency decision had to be appealed via the administrative procedure act – not collaterally attacked while defending a later discrimination suit. *See* Mo. Rev. Stat. §213.085; 8 C.S.R. 60-2.025(7)(E). *See also*, Southwestern Bell v. Missouri Comm'n on Human Rights, 863 S.W.2d 682, 686 (Mo. Ct. App. 1993); St. Louis County v. Missouri Comm'n on Human Rights, 693 S.W.2d 173, 174 (Mo. Ct. App. 1985); Bresnahan v. May Dept. Stores Co., 726 S.W.2d 327, 329-30 (Mo. 1987) (if no appeal of agency determination, cannot collaterally attack it in subsequent litigation). Section 213.085, and the applicable regulation, 8 C.S.R. 60-2.025(7)(B)(3), further confirm this, as they provide that the agency determines its own jurisdiction. Id. Thus, the fact that section 213.111 RSMo did not, and does not, include a timeliness requirement in the prerequisites for a civil action, and the result of the holding of Webb that the Courts should not have judicially added such a requirement, is consistent and made and makes sense.

Here, Respondents were notified of the administrative proceeding and did not present any argument as to timeliness or MHRC jurisdiction to that agency and did not seek a writ of prohibition to prevent the MHRC from exercising jurisdiction or going forward. *See generally*, L.F. 159-160, 227-228, 300-302. Then, when the Commission issued its right to sue letter, which by necessity indicated a finding of agency jurisdiction,

the Respondents did not appeal that decision through the administrative procedure act. *See generally*, L.F. 159-160, 227-228, 300-302. By doing so, Respondents abandoned the argument of untimeliness before the agency and any other agency-related arguments. In light of the above-enumerated authority, the same should thus not have been raised, and were not properly cognizable by the Court in this later judicial action.

Under applicable law, the only inquiry for the trial court with respect to pre-conditions to filing was whether the right to sue letter issued and whether the court proceeding was initiated within 90 days of it. See §213.111 RSMo. To consider the collateral attack on the timeliness of the agency filing would be contrary to Webb and its litany. *See e.g.*, McCracken v Wal-Mart Stores East, LP, 298 S.W.3d 473 (Mo. 2009); Charron v. Mo. Bd. of Prob. & Parole, 373 S.W.3d 26, 29 (Mo. Ct. App. 2012); Jones v. Paradies, 2012 Mo. App. LEXIS 871 (Mo. Ct. App. June 29, 2012); Mansheim v. Dir. of Revenue, 357 S.W.3d 273 (Mo. Ct. App. 2012); Davis v. Davis, 351 S.W.3d 25 (Mo. App. 2011), Evans v. Empire Dist. Elec. Co., 346 S.W.3d 313, 317-319 (Mo. Ct. App. 2011) and Alhalabi v. Missouri Dept. of Resources, 300 S.W.3d 518 (Mo. Ct. App. 2009). Moreover, a holding that the Court could consider such a "defense" in this action even though Respondents did not present any defense that the filing with the MHRC was untimely to that Agency itself would also be contrary to Missouri law. See McCracken, 298 S.W.3d 473; Shafinia v. Nash, 372 S.W.3d 490, 493-495 (Mo. Ct. App. 2012); Evans, 346 SW3d at 317-319; and Southwestern Bell, 863 S.W.2d at 686; St. Louis

County v. Missouri Comm'n on Human Rights, 693 S.W.2d 173, 174 (Mo. Ct. App. 1985); Bresnahan, 726 S.W.2d at 329-30. [3]

In this instant case, the undisputed facts in the record reflect that Farrow filed her complaint with the Missouri Human Rights Commission, that her complaint was accepted and processed by the MHRC, the MHRC subsequently issued a right to sue letter, [L.F. 20-21, 206-207, 211-212, 224] and suit was filed within 90 days thereafter [L.F. 6]. The exhaustion requirement of Mo. Rev. Stat. §213.111 was thus satisfied according to the express words of the statute. *See* Mo. Rev. Stat. §213.111; *See also*, Webb, supra; *See* Mo. Rev. Stat. §213.101 (statutes are to be construed to accomplish the chapter's purpose).

Further, the question of "exhaustion of remedies" is a question of whether the appropriate agency had an opportunity to evaluate the claim and consider a remedy. It is

---

[3] As noted above, this does not make those requirements irrelevant, because they are still relevant to the initial Agency proceedings. If the Agency's determination of timeliness and agency jurisdiction had been challenged in the Agency proceedings or by administrative act appeal and a different decision had been rendered, no right to sue letter would have issued and that prerequisite to judicial action would not have been met. Because the question of whether or not the agency should have issued a right to sue letter is NOT jurisdictional for the Court in light of Webb, however, the question can NOT be raised "at any time" and was and is not properly the subject of this later court action.

thus a factual as well as legal doctrine. To the extent the Court is concerned with the purpose and rationale of the exhaustion requirement – that the Agency empowered to enforce certain laws in the first instance be given the opportunity to do so – such purpose and rationale also support the reversal of the ruling below. In this case, as a matter of undisputed fact, the agency was provided with and accepted the opportunity to conduct its investigation and issued a right to sue letter. As a factual matter, exhaustion of administrative remedy occurred or there is, at a minimum, a question of fact on the issue precluding judgment against Farrow at this early stage.

B. Status of Employer

In the trial court below, Saint Francis and Strange also argued that Saint Francis fell within an exemption from the statutory definition of "employer," specifically, Mo. Rev. Stat. §213.010(7), because it was allegedly "owned and operated by religious or sectarian groups." That argument is also unavailing.

First and foremost, the question of whether or not Saint Francis falls within a statutory exemption is a matter of affirmative defense. *See* Mo. R. Civ. P. 55.08 and 55.27. It thus must be raised in such a manner, and may not be raised by Motion. See McCracken, 298 S.W.3d at 479 ("A claim that the court has before it is an exception to the normal rule…is a matter of affirmative defense that must be pleaded and proved as provided in Rules 55.08 and 55.27. It is not a defense that may be raised as a motion to dismiss."); State ex rel. KCP&L Greater Mo. Operations Co. v. Cook, 353 S.W.3d 665 (Mo. Ct. App. 2011); Evans, 346 S.W. 3d at 317-319; Belt v. Wright County, 347 S.W.3d 665 (Mo. Ct. App. 2011); Treater v. Betts, 324 S.W.3d 487 (Mo. Ct. App. 2010);

Robinson v. Hooker, 323 S.W.3d 418 (Mo. Ct. App. 2010). Although the Supreme Court ruled in McCracken that it would consider a different defense raised before it because the pre-Webb case law had confusingly and erroneously indicated the issue was jurisdictional and could be raised at any time, it specifically noted that from and after McCracken, raising such defenses by Motion would NOT be an appropriate vehicle. Id. In the instant case, Respondents filed their motion in the Court below two years after McCracken was decided and that opinion was published, and Farrow respectfully asserts it would be inappropriate to afford these Respondents the same courtesy. However, if Respondents seek to again raise their claim of exemption in argument before this Court and the Court decides to entertain the same despite the lack of affirmative defense and McCracken, the result will not change.

Although set out by statute, the exemption upon which any such argument from Respondents would rely is implemented by 8 C.S.R. 60-3.010(9). That regulation specifically notes that the term "operated by a religious or sectarian group" means that "being a member of that religion or sect must be a requirement for employment for that corporation or association." 8 C.S.R. 60-3.010(9). Saint Francis has no such requirement and thus does not fall within the exemption.[4] Further, in Wirth v. College of the Ozarks,

[4]In St. Louis Christian Home v. Missouri Commission on Human Rights, 634 S.W.2d 508 (Mo. Ct. App. 1982) the Western District was presented with the question of what "owned and operated by a religious or sectarian group" meant. In that case, however, the C.S.R. regulation, although having been enacted, did not apply because the case arose

26 F.Supp.2d 1185 (W.D.Mo. 1998), the Court specifically held that the "religious corporation" exception provides an exemption from liability only in the narrow situation

---

before its effective date. Indeed, that Court expressly noted the regulation did not apply to the case before it. St. Louis Christian Home, at 514. Farrow acknowledges, however, that, in passing dicta, that court expressed a thought that the regulation might not be enforceable if it were to have been in effect, based on a belief that the regulation of the MCHR exceeded the Commission's statutory authorization for such a regulation. This was an erroneous view of the MCHR's authority, however. Under Missouri Law, the MCHR is delegated both the power and the duty from the legislature, via Mo. Rev. Stat. §213.010.1(6), to "adopt, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter and the policies and practices of the commission in connection therewith." Giving this statutory language its plain meaning, as required by Mo. Rev. Stat. §1.090, reflects that the MCHR was instructed and authorized to elucidate the meaning of "owned and operated" in the statutory definition of an "employer" (Mo. Rev. Stat. §213.010(7)). The regulation in issue does just that, and does not, in fact, exceed the Commission's statutory authority. The Western District's dicta is thus not even persuasive. Further, the opinion in St. Louis Christian Home was rendered in 1982. The C.S.R. regulation at issue was amended, however, in 1986, four years later. At that time, despite being aware of the Court's dicta, the MCHR, which has the authority to promulgate these rules and regulations based on Mo. Rev. Stat. §213.030.1(6), did not remove the definitional regulation. It is good law.

in which religious institutions employ only persons whose beliefs were consistent with the views of the religious organization in question. Id. at 1187. The instant case does not involve the termination of Farrow due to inconsistent religious beliefs, and Respondents have asserted no facts or evidence to indicate that such beliefs played any role in her termination. [L.F. 325, ¶2]. This case is not a claim of discrimination based on religious belief and any exemption does not apply as a matter of law.

However, even if the Court were to believe that the exception could apply to this case, the facts of record would still preclude the entry of judgment in reliance upon it. The evidence at bar established that Saint Francis is a Missouri not-for-profit corporation. Under Missouri law a not-for-profit company does not have any owners. See e.g. Stacy v. Truman Medical Center, 836 S.W.2d 911,920 (Mo. 1992). It thus cannot, by law, be "owned" by a religious or sectarian group. The lack of "owners" is also recognized in Article IV of Saint Francis' Articles of Incorporation, which state that Saint Francis "shall have no capital stock and no dividends or pecuniary profits shall be declared or paid to any individual or individuals, firms or corporations whatsoever" and in Section 4 of its Bylaws which state that Saint Francis is "organized without capital stock and no part of [its] net earnings . . . shall inure to the benefit of or be distributable to the benefit of any Director, Officer, or private individual. . ." [L.F. 91] (emphasis added). Thus, the first requirement of the statutory exception – ownership by a qualifying group – is not met and the exception thus does not apply to this case.

Further, even if Saint Francis could establish that it is "owned" by such a group, it would not qualify as an entity that is BOTH owned **and operated** by such a group.

Section 5 of Saint Francis' Bylaws states that "[t]he President and Chief Executive Officer shall be responsible for operating [Saint Francis], managing all of its activities and conserving all of its resources. These responsibilities shall include exercising full executive authority over all [Saint Francis] activities and services . . ." [L.F. 101]. Thus, Saint Francis is operated by its President and Chief Executive Officer, not by any group, be it religious, sectarian, or otherwise. Just as was the case with the "ownership" component of the Mo. Rev. Stat. §213.010(7) exclusion, Saint Francis is also unable to meet the "operates" portion of the statute as well.[5] Saint Francis is an employer within the meaning of the statute or, at minimum, there was and is a question of fact regarding the issue.

As noted above, Farrow's claim for sexual harassment and discrimination set forth in Count I of her Amended Petition was properly plead, and there are at least questions of fact on all elements. The Trial Court's grant of judgment was error and is properly reversed. This count is properly remanded to the trial level for further proceedings.

---

[5] Even if Saint Francis could somehow claim to be an exempt organization, Strange's claim that such an exemption of the organization would also inure to his individual benefit is not supported by statute, regulation or case law, and such an exemption would not, and should not, exempt Strange in any event, since the public policy considerations behind the exemption do not apply to an individual such as Strange.

II. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT II OF HER FIRST AMENDED PETITION ALLEGING UNLAWFUL RETALIATION IN VIOLATION OF THE MISSOURI HUMAN RIGHTS ACT, IN THAT THE CLAIM WAS PROPERLY PLEAD, ANY ARGUMENTS RELATING TO THE PRE-FILING PROCEEDINGS BEFORE THE MISSOURI COMMISSION ON HUMAN RIGHTS WERE NOT RAISED BEFORE THE AGENCY AND WERE NOT PROPERLY BEFORE THE COURT IN LIGHT OF *J.C.W. EX REL. WEBB V. WYCISKALLA* AND THERE WERE, AT A MINIMUM, QUESTIONS OF FACT PRECLUDING JUDGMENT AS A MATTER OF LAW.

Count II of Farrow's Amended Petition sets out a claim against both Respondents for violating the Missouri Human Rights Act through retaliation. A review of the record reveals that Count II of Farrow's claim was also properly plead, and that there are at least questions of fact on each element of such claim, thus precluding judgment.

For Farrow to prevail on Count II she needed to plead and ultimately prove: (1) she is a member of a protected group and complained of and subject to discrimination; (2) adverse action was taken against her; and (3) a causal relationship existed between the complaint of discrimination and the adverse employment action. Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238, 245 (Mo. Ct. App. 2006); Barekman, 232 S.W.3d at 681. Under the MHRA, it is an unlawful discriminatory practice "[t]o retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint . . .." Section 213.070(2), RSMo 2000. She must also show that she filed a complaint with the

MCHR for investigation, was issued a letter indicating her right to bring a civil action, and did so within ninety days of such notice. See Mo. Rev. Stat. §213.111. For her claims against Strange, she must show he was a supervisor. [L.F. 7-8, 21]. Barekman, 232 S.W.3d at 681; Hill v. Ford Motor Co., 277 S.W.3d 659, 669 (Mo. 2009).

A review of Farrow's Amended Petition reveals that she alleged all necessary elements, including the retaliation for opposing the practices and conduct of Respondents which were practices and conduct prohibited by the Act. [L.F. 24-25, ¶93-97]. Indeed, in the trial court, Respondents again did not contend otherwise. In addition, even though Respondents filed their motions upon which judgment was entered prior to any discovery being conducted in the case, the allegations and evidence still established at least questions of fact on every element on this Count as well. See L.F. 24, ¶94-97. Actions taken in retaliation and discrimination due to complaints about prior prohibited acts are actionable. The Respondents sole arguments to the Court below were the same "defective exhaustion of remedies" and "We are not an 'Employer'" arguments discussed in Point I above. They once again fail for the reasons noted above in Point I.

For all the reasons set forth above, the Trial Court's Order and Judgment entering judgment against Farrow on this Count II is thus also properly reversed and this Count is also properly remanded to the trial court for further proceedings.

III. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT III OF HER FIRST AMENDED PETITION ALLEGING RETALIATORY DISCHARGE IN VIOLATION OF THE MISSOURI HUMAN

RIGHTS ACT IN THAT THE CLAIM WAS PROPERLY PLEAD, ANY ARGUMENTS RELATING TO THE PRE-FILING PROCEEDINGS BEFORE THE MISSOURI COMMISSION ON HUMAN RIGHTS WERE NOT RAISED BEFORE THE AGENCY AND WERE NOT PROPERLY BEFORE THE COURT IN LIGHT OF *J.C.W. EX REL. WEBB V. WYCISKALLA* AND THERE WERE, AT A MINIMUM, QUESTIONS OF FACT PRECLUDING JUDGMENT AS A MATTER OF LAW.

Standard of Review

For the reasons noted above, the standard of review is "de novo."

Argument

Count III of Farrow's Amended Petition sets out a claim against Saint Francis for retaliatory discharge in violation of the Missouri Human Rights Act through retaliation. A review of the record before the Court, reveals that Count III of Farrow's claim was, once again, properly plead, and that there are at least questions of fact on each element of such claim, thus precluding judgment.

For Farrow to prevail on Count III she needed to plead and ultimately prove: (1) she is a member of a protected group; (2) she was terminated from employment in retaliation for her opposing practices and conduct of St. Francis which were practices and conduct prohibited by the act and against public policy; (3) such conduct was a contributing factor in her termination; and (4) that such discharge and conduct caused her damage. Fleshner v. Pepose Vision Inst., P.C., 304 S.W.3d 81, 94 (Mo. 2010); MAI 38.03; Barekman, 232 S.W.3d at 681. She must also show that she filed a complaint with the Missouri Commission on Human Rights for investigation, was issued a letter

indication her right to bring a civil action, and did so within ninety days of such notice. See Mo. Rev. Stat. §213.111. For her claims against Strange, she must show he was a supervisor. [L.F. 7-8, 21]. Barekman, 232 S.W.3d at 681; Hill, 277 S.W.3d at 669.

As noted, a review of Farrow's Amended Petition reveals that she alleged all necessary elements. [L.F. 7, 25-26]. In addition, once again, even though Respondents filed their motions upon which judgment was entered prior to any discovery being conducted, the evidence still established at least questions of fact on every element. See Point I and citations to Legal File contained therein; See also L.F. 18, ¶66 (discharge was in retaliation and discrimination due to complaints about prior prohibited acts – i.e. her "problems in radiology"); L.F. 26, ¶101 (damages suffered as a result). Again, the likely arguments of Respondents that Farrow did not exhaust her administrative remedies or that they are not "Employers" fail for the reasons noted above.

For these reasons and for the reasons addressed in the context of Count I relating to Farrow's exhaustion of remedies and Saint Francis' status as an employer (which are equally applicable to this Count), the Trial Court's Order and Judgment entering judgment against Farrow on Count III prior to any Answer or discovery was also error and is also is properly reversed and remanded.

IV. THE TRIAL COURT ERRED IN GRANTING JUDGMENT IN FAVOR OF RESPONDENTS ON FARROW'S SEPARATE PUBLIC POLICY EXCEPTION WRONGFUL DISCHARGE CLAIM (COUNT V IN HER FIRST AMENDED PETITION), IN THAT (A) THE RESPONDENTS HAD MOVED TO DISMISS THE

COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE AND (D) FARROW WAS ENTITLED TO LEAVE TO AMEND HER CLAIM IN ANY EVENT.

Standard of Review

For the reasons noted above, the standard of review is "de novo."

Argument

Count V of Farrow's First Amended Petition asserts a claim for wrongful termination of her at-will employment under the public policy exception. Said claim states a claim as a matter of law.

"Although the general rule in Missouri is that an at-will employee may be terminated for any reason or no reason, the at-will-employment doctrine is not static. It may be modified directly by or through public policy reflected in the constitution, a statute, a regulation promulgated pursuant to statute, or a rule created by a governmental body. Fleshner, 304 S.W.3d at 92 (Mo. 2010) *citing* Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 663 (Mo. 1988). A holding otherwise would allow employers to discharge employees, without consequence, for doing that which is beneficial to society. As such, this Court has expressly adopted the following as the public-policy exception to the at-will employment doctrine:

> "An at-will employee may not be terminated (1) for refusing to violate the law or any well-established and clear mandate of public policy as expressed in the constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.

Id. citing Porter v. Reardon Mach. Co., 962 S.W.2d 932, 936–37 (Mo.App.1998); and Boyle v. Vista Eyewear, 700 S.W.2d 859, 878 (Mo. Ct. App. 1985). If an employer terminates an employee for either reason, then the employee has a cause of action in tort for wrongful discharge based on the public-policy exception. Fleshner, 304 S.W.3d at 92.

Count V of Farrow's Amended Petition specifically pled each of the necessary elements for a public policy exception wrongful discharge claim. See [L.F. 27-31]. Farrow alleges that she and the other nurses were prohibited from administering PICC lines to patients as punishment for Farrow's complaints about Strange's advances, and that such removal was improper both because it was such retaliation and separately because the nurses were replaced with persons not authorized to do such procedures under Missouri law and regulation. Her claim for wrongful discharge asserts that she was terminated, at least in part, for her objection to and outspoken disapproval of, and failure to comply with, the changes to the PICC line procedures instituted by the Respondents which required non-nurses to perform the PICC Line procedures in violation of Missouri law, which objection, disapproval and failure to comply was required by the public policy

as stated in the Nursing Practice Act, Mo. Rev. Stat. §335.011, et seq. ("NPA") and corresponding regulations. Id.

The NPA and corresponding regulations specify that licensed practical nurses and registered professional nurses who have been instructed and trained in such procedures in a course of instruction approved by the board are to administer intravenous fluid. Mo. Rev. Stat. §335.017. "Administer" is defined in 20 C.S.R. 2200-6.020(1) as "to carry out comprehensive activities involved in intravenous infusion treatment modalities that include, but are not limited to, the following: observing; performing; monitoring; discontinuing; maintaining; regulating; adjusting; documenting; assessing; diagnosing; planning; intervening; and evaluating." Included under the definition of "Central venous catheter" is "peripherally inserted central catheters (PICCs)." 20 C.S.R. 2200-6.020(3). The NPA provides that the Board of Nursing may refuse to reinstate or issue a nursing license in the event any holder of a certificate of registration or license under the Nursing Practices Act for the violation of, assisting or enabling any person to violate any provision of 335.011 to 335.096, or any lawful rule or regulation adopted pursuant to 335.011 to 335.096. Mo. Rev. Stat. § 335.066.2(6). Further, inherent with such practices, registered nurses of the State of Missouri are responsible for making ethical decisions pursuant to applicable codes of ethics for nurses and using their efforts to provide the best care of their patients, keeping patient safety paramount. 335.016 (14), (15). Pursuant to Mo. Rev. Stat. §335.096, it is a Class D Felony for someone to violate any of the provisions of the Nursing Practice Act – a strong indicator of the public policy in favor of having qualified nurses perform this type of work.

As alleged in her Amended Petition, Farrow was a registered nurse with Respondent Saint Francis Hospital. [L.F. 325, ¶3]. Nurse Farrow was responsible for overseeing the hospitals PICC program – the insertion and monitoring of intravenous fluid through a tubing device known as a PICC tube – into patients in need of such treatment. [L.F. 10, ¶19-21]. The Respondents removed Farrow from her role as overseeing PICC line procedures within radiology, and adopted a procedure pursuant to which non-nursing/non-doctor personnel were told to handle PICC line procedures for the department and Farrow and others were told to aid and abet them in this process. [L.F. 28, ¶110; 325, ¶4-6]. Such persons are not authorized to perform such procedures as a matter of Missouri law. See Mo. Rev. Stat. §334.735.3 (outlining the scope of practice of a physician assistant.) No evidence was submitted concerning the qualifications or practices of her replacement, Mr. Barwick, who upon Farrow's belief, was a physician assistant. [L.F. 325, ¶ 4]. The only exception would be if evidence had been adduced concerning the performance of the tasks associated with the PICC line under the supervision of a licensed physician. Mo. Rev. Stat. § 334.735.3. No such evidence was introduced, and as such, based upon the allegations and evidence of record, it was improper as a matter of law. Farrow complained repeatedly and continuously about the change throughout her remaining time in radiology. [L.F. 30]. When Farrow was later terminated it was, at least in part, due to her vocal opposition to the use of non-nurses to perform the PICC procedures. [L.F. 30]. Staying silent would have violated the Nursing Practices Act, as well as the ethical aspects of nursing. See Mo. Rev. Stat. § 335.066.2(6). This Court has previously recognized that termination of employment due

to a refusal to violate or condone the violation of the Nursing Practices Act *supports a claim* for the public policy exception wrongful discharge. *See* Kirk v. Mercy Hospital Tri-County, 851 S.W.2d. 617, 622 (Mo. Ct. App. 1993). Count V of Farrow's Amended Petition stated a claim upon which relief can be granted.

Notably, no facts or evidence were submitted by Saint Francis which disputed the assertions in Count V of Farrow's First Amended Petition. Thus the same could not properly be viewed as a motion for summary judgment. In any event, however, Farrow DID submit evidence of record which supported each element of the claim. The record reflects that Farrow was a registered nurse [L.F. 325, ¶3]. Chuck Barwick, the individual selected by Strange, and affirmed by the acquiescence of the Hospital, was not a nurse. [L.F. 325, ¶5]. Yet it was Dr. Strange's order that Mr. Barwick be the point person for all the PICC line procedures and insert the lines. [L.F. 325, ¶6]. Mr. Barwick's participation in administering PICC lines was in violation of Missouri law and Farrow had an affirmative duty to object and attempt to prevent this violation under the Nursing Practices Act and also pursuant to Saint Francis' own policy regarding "Compliance Reporting." [L.F. 319].[6] Farrow did in fact object and complain repeatedly and vocally

[6] To the extent Respondents would now claim that Barwick, the non-nurse, qualified as a "physician's assistant", such a claim would be unavailaing. Even a physician's assistant can only legally administer PICC lines if there was evidence establishing that he was authorized under Missouri law to do so under a physician's order. See Mo. Rev. Stat. § 334.735. Respondents presented absolutely no evidence of such a plan and there is no

about the use of non-nurses to administer PICC lines. [L.F. 30, ¶117]. Farrow was disciplined and ultimately terminated due to her "problems in radiology and bad attitude." [L.F. 18, ¶66]. The only "problems" in radiology were Farrow's vocal complaints about the retaliation she suffered as a result of rebuffing Strange's advances, including most notably her complaints about his switch to the use of non-nurses to do PICC line procedures. [L.F. 10-18].

Thus, even though this matter was brought to the trial court before an answer had even been filed or any discovery conducted, the facts of record already established at least a question of fact on each issue, precluding summary judgment.

The trial court erred, and its ruling is properly reversed, with the matter remanded to the trial court for further proceedings.

Saint Francis sought dismissal of Count V in the Court below under a theory that it did not contain enough allegations about how the termination of Farrow for objecting to the switch to having a non-nurse administer PICC lines violated the NPA, relying on Margiotta v. Christian Hospital Northeast Northwest, 315 S.W. 3d 342 (Mo. banc. 2010). If this argument was the basis for the Trial Court's ruling (again, it is impossible to tell since the trial Court did not articulate any rationales for any of its rulings), then said ruling was in error. Farrow's First Amended Petition was sufficient as written and set forth all allegations required by Fleshner, supra. Further, each element set forth in

---

indication in the record of any such plan existing, and such a position was never asserted by Respondents below.

Missouri Approved Instruction 38.03 is also alleged. See MAI 38.03 [2012 Revision]. Respondents arguments thus do not support the Trial Court's ruling and the same should be reversed.

Moreover, even if something "more" were deemed to be required, the result would not change and the Trial Court is still properly reversed. Farrow also provided additional, specific cites to applicable provisions of the NPA and the state regulations in her responses to Saint Francis' dispositive motions, pinpointing exact violations, sufficient to overcome even the objections raised by Saint Francis. [L.F. 310]. Further, Farrow specifically moved and requested, in the alternative, that if the Trial Court believed that the allegations stated in the First Amended Petition did not contain enough particularity, she be granted leave to amend her Petition [L.F. 311].

Pursuant to applicable rule, leave to amend a pleading "shall be freely given when justice so requires," Mo. R. Civ. P. 55.33(a), and when a claim is dismissed leave to amend is to be granted. Mo. R. Civ. P. 67.06. Schwartz v. Lawson, 797 S.W.2d 828, 833 (Mo. Ct. App. WD 1990) (leave to amend should precede summary adjudication); Fox v. St. Louis, 823 S.W.2d 22, 25 (Mo. Ct. App. ED 1991). Because, under any circumstance, the record before the Court established that there were facts and allegations upon which a claim could be stated, even if the allegations as contained in Count V itself had not been sufficient, judgment against Farrow would still have been improper, and leave to amend should have been properly granted.

For the above reasons, the Trial Court's ruling granting judgment against Farrow is properly reversed and the matter should be remanded for further proceedings, and/or

with instructions to grant Farrow leave to amend her claim if this Court feels the claim as stated is not sufficient.

V. THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST FARROW ON COUNT IV OF HER FIRST AMENDED PETITION ALLEGING SEPARATE DISCRIMINATION AND RETALIATION IN THE POST-DISCHARGE INTERNAL APPEAL PROCESS IN THAT RESPONDENTS HAD ONLY MOVED TO DISMISS THE SAME FOR FAILURE TO STATE A CLAIM, DISCRIMINATION BY AN EMPLOYER IN ITS INTERNAL POST-TERMINATION APPEAL PROCESS IS ACTIONABLE UNDER THE MISSOURI HUMAN RIGHTS ACT, THE RIGHT TO SUE LETTER ISSUED BY THE MHRC WAS LEGALLY SUFFICIENT TO INCLUDE SUCH CLAIM, THE CLAIM WAS PROPERLY PLEAD, AND THE RECORD ESTABLISHED QUESTIONS OF FACT ON ALL ELEMENTS PRECLUDING SUMMARY JUDGMENT IN ANY EVENT.

Standard of Review

As noted above, the standard of review is "de novo."

Argument

In Count IV of her Amended Petition, Farrow alleges separate and additional (although obviously related) retaliation in the post-termination discharge process. In the Court below, Respondents moved to dismiss this Count for failure to state a claim. [L.F. 132-134]. The Respondents claimed that discrimination by an employer in its internal,

post-termination appeal process is not actionable under the Missouri Human Rights Act as a matter of law and that the claim had not been presented to the MHRC, and was thus not within the right to sue letter that had been issued and that the requirements of Mo. Rev. Stat. §213.111 for exhaustion of remedies had thus not been met. However, such contentions are unfounded.

Section 213.055.1(1) (a) of the Missouri Revised Statutes states in pertinent part:

1. It shall be an unlawful employment practice:

(a)....to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, national origin, sex, ancestry, age or disability;

Mo. Rev. Stat. §213.055.1(1) (a). The law does not only prohibit discrimination in, with respect to, or during a person's employment, but also prohibits discrimination with respect to any of the "privileges of employment." In the instant case, there is no dispute that employees of Saint Francis were given the privilege of appealing a termination decision and that such an appeal was a privilege of employment. Section 213.055.1(1) (a) thus prohibited discrimination in that process. Id. Similarly, Section 213.070(1) and (2) of the Missouri Revised Statutes states in pertinent part:

It shall be an unlawful discriminatory practice:

(1) To aid, abet, incite, compel, or coerce the commission of acts prohibited under this chapter or to attempt to do so;

(2) To retaliate or discriminate in any manner against any other person because such person has opposed any practice prohibited by this chapter or because such person has filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing conducted pursuant to this chapter;

Mo. Rev. Stat. §213.070(1), (2). Count IV of Farrow's Amended Petition alleges that such retaliation and discrimination occurred with respect to the privilege of employment – her internal appeal – because she had opposed a prohibited practice. It thus states a claim. L.F. 18-21, ¶66-73, pg. 26-27; ¶103-106.[7] Further, this Court specifically held, in Keeney v. Hereford Concrete Prods., that severance of the employment relationship does

[7] Respondents complained that the heading of Count IV reads: "Count IV Violation Under the MHRA Retaliatory Discharge" and that the post-discharge appeal is clearly not a discharge. Plaintiff acknowledges that the heading of her Count IV – which is for convenience and is not an allegation of fact or the assertion of a claim – was inartfully worded and should have stated "Discrimination with Respect to Privilege of Employment". However, the inartful wording does not change the fact that the actual allegations of the Count set out a claim for discrimination and retaliation with the respect to the provided privilege of appeal. If the inartful heading of the Count was of concern to the Court, then the proper ruling was to allow Plaintiff to amend to reword the heading of the Count, not to enter judgment on the same against Farrow.

NOT affect the validity of a claim for post-employment retaliation. Keeney v Hereford Concrete Prods, 911 S.W.2d 622, 625 (Mo. 1995).

In addition, the Right to Sue letter issued by the MHRC encompassed the claim in issue and authorized the action. The Right to Sue letter granted Farrow the right to sue all respondents (plural) with respect to the administrative case entitled "Farrow v St. Francis Medical Center FE-7/09-10658 846-2009-50009." [L.F. 224]. The right to sue thus authorized suit for all claims of discrimination encompassed by the administrative charges contained in the indicated administrative proceeding. When considering whether prior administrative charges adequately address a claim raised in a subsequent lawsuit, the "administrative complaints are interpreted liberally in an effort to further the remedial purposes of legislation that prohibits unlawful employment practices. ... [A]dministrative remedies are deemed exhausted as to all incidents of discrimination that are like or reasonably related to the allegations of the administrative charge. ... [T]he scope of the civil suit may be as broad as the scope of the administrative investigation which could reasonably be expected to grow out of the charge of discrimination." Alhalabi, 300 S.W.3d 518 at 525 (internal citations omitted.) Section 213.101 also specifically instructs the Court to construe any requirements broadly so as to accomplish the purposes of the chapter. Mo. Rev. Stat. §213.101.

Farrow fully and completely reported the events that transpired giving rise to her claims to the claims investigator, including the discrimination and retaliation in the appeal process. [L.F. 211-212]. She relied on the investigator's judgment when he wrote out and proffered the written charge of discrimination for her signature. Id. The agency

investigator is the person who took down the complaints of Farrow, including those involving the appeal, and determined what would be in the written charge. Id. The written charge, including the names, dates, categorization of claim(s) and the synopsis provided in the "particulars" section with an abbreviated version of her complaint, was prepared by the investigator and presented to Farrow to sign. Id. As a factual matter, the agencies were provided with the claim by Farrow in her interviews and it was actually considered. Moreover, and in any event, giving the administrative complaint the "liberal interpretation" which Missouri law demands it be afforded, even the written charge is sufficient as a matter of law. *See* Alhalabi, supra. Ms. Farrow's claims that she was again discriminated and retaliated against during Saint Francis' internal appeal/grievance process is a claim which can reasonably have been expected to be included in an administrative investigation which could reasonably be expected to grow out of the charge of discrimination as written. Id.; Keeney, 911 S.W.2d at 625. Accordingly, under Missouri law, they fall within the ambit of the Right to Sue letter, and the requirements of Mo. Rev. Stat. §213.111 were met. Count IV of Farrow's Amended Petition was properly plead and states a claim. The Trial Court's ruling to the contrary was error and is properly reversed, and this Count is also properly remanded to the trial court for further proceedings.

VI. ASSUMING ARGUENDO THAT THE QUESTION OF THE TIMELINESS OF FARROW'S PRESENTATION OF HER CLAIM TO THE MISSOURI COMMISSION ON HUMAN RIGHTS WAS A MATTER FOR THE COURT TO GENERALLY

CONSIDER, IT WOULD STILL HAVE BEEN ERROR FOR THE TRIAL COURT TO ENTER JUDGMENT AGAINST FARROW ON COUNTS I –IV OF HER AMENDED PETITION IN THAT QUESTIONS OF MATERIAL FACT WOULD HAVE STILL EXISTED AS TO WHETHER FARROW'S FILING WITH THE AGENCY WAS TIMELY AND, IF IT WERE NOT TIMELY FOR ANY REASON, WHETHER RESPONDENTS WERE ESTOPPED FROM RAISING, HAD WAIVED ANY RIGHT TO WAIVE, OR WERE OTHERWISE EQUITABLLY PRECLUDED FROM RAISING ANY INFIRMITY THAT MIGHT EXIST.

Standard of Review

As noted above, the Standard of Review is "de novo."

Argument

In the Court below, Respondents devoted significant amount of their motion briefing to a contention that Farrow filed her charge with MHRC "late." As noted above, since Webb, once the administrative agency determined that the filing was timely, that it had jurisdiction and issued a Right to Sue letter (which actions that were not challenged or appealed by Respondents), this issue was no longer germane to the later discrimination suit from which this appeal arises. The argument relies upon the contention that an employee's civil discrimination suit is barred due to a failure to *timely* present the claim to the MCHR, even when: a) the claim was in fact presented to the MCHR b) the employer did not challenge the timeliness of that submission in the proceedings before the MCHR; c) the MCHR found the complaint was timely submitted and issued a right to sue letter; d) the employer did not appeal that determination in the manner provided for

the appeal of agency decisions; and e) the complaining employee then filed her judicial proceeding within the time frame required after the receipt of the Right to Sue letter. Such an argument is without a basis in law or fact, and even if the Court were for any reason to deem an inquiry into the timeliness of Farrow's agency filing to still be of relevance, the result of this appeal would not change.

In the pre-Webb cases which addressed the issues of timeliness of agency filing, the Courts noted that an act of harassment, discrimination or retaliation within the administrative charge filing period which was part of a series of interrelated events rather than isolated or sporadic acts of discrimination, causes all acts within that series to be properly assertable, even if the earlier acts within the series fall outside of the 180 day window. *See, e.g.,* Rowe v. Hussmann Corp., 381 F.3d 775, 782 (8th Cir. 2004) (internal citations omitted).

The undisputed evidence in this case reveals that Farrow's Complaint to the MCHR *was* filed within 180 days of the last alleged discriminatory act alleged, i.e., Saint Francis' grievance process-related discriminatory/retaliatory actions, and such filing would support Counts I, II, III and IV of this suit. Further, even absent the continuing practices doctrine, the evidence at bar establishes, or at least raises a question of fact as to whether the filing was timely in any event under equitable extension principles. *See* Thompson v. Western-South Life Assurance Co., 82 S.W.3d 203, 208 (Mo. Ct. App. 2002), Pollock v. Wetterau Food Distribution Group, 11 S.W.3d 754 (Mo. Ct. App. 1999); See *also* Rowe v. Hussmann Corp., 381 F.3d 775, 782 (8th Cir. 2004); Giandinoto v. Chemir Electrical Services, Inc., 545 F.Supp.2d 952, 957 (E.D.Mo. 2007). If the

question of the timeliness was still a subject for collateral attack in a subsequent discrimination civil suit notwithstanding the Respondents failure to appeal the administrative agencies determination, any requirement would also still be subject to waiver, estoppel, tolling, and other equitable adjustment. The prior cases that held these principles inapplicable to agency exhaustion requirements are no longer good law in the face of the Missouri Supreme Court ruling in Webb. *See, e.g.* Evans, 346 S.W.3d at 316-317; Ware v. Ware, 337 S.W.3d 723, 725-726 (Mo. Ct. App. 2011). Importantly, however, even prior to Webb, the above-cited cases recognized that the date upon which any required filing period would be deemed to commence would be affected by the totality of the facts and equitable considerations. Thompson, 82 S.W.3d at 208; Pollock, 11 S.W.3d 754 (Mo. Ct. App. 1999); *See also* Rowe, 381 F.3d at 782; Giandinoto, 545 F.Supp.2d at 957.

Even under prior case law, where an Respondent was shown to have intentionally caused the claimant to delay approaching the agency, the period for filing was expanded. *See* Dunham v. City of O'Fallon, 994 F. Supp. 1256 (Mo. Ct. App. 1996) (period expanded where delay in filing is caused by deliberate design of employer or where employer should have understood its actions would cause employee to delay filing charge). In this case the evidence shows that it is exactly what the Respondents did, and is exactly what Respondents should have understood, or at a minimum there are questions of fact concerning these points. The evidence reveals that Respondents delayed providing Farrow with necessary information to allow her to prosecute her internal appeal, mislead her as to the steps to take, delayed giving rulings at the various stages,

and then sought additional time as their view of the date for filing with the Agency approached. [L.F. 204, 209-210]. The evidence demonstrates that the Respondents did not assert a concern with the timing of the charge before the Agency, the Agency ruled that it had jurisdiction, issued a right to sue letter, and Respondents did not challenge or appeal that ruling. It also shows that, even prior to that date, the Respondents delayed providing Farrow with the information on how to process her internal appeal, then delayed the appeal process, and then retaliated against her in the process by not conducting a meaningful appeal and not even following their own progressive discipline policies, without explanation. Thus, even if the timeliness of the agency filing were before the Court, there would be at least questions of material fact as to whether Respondents are estopped from asserting any defense that might otherwise exist based on the timeliness of Farrow's approach to the Agency, whether they have waived any such defense, whether the time period for filing any such administrative charge had been tolled, and whether other equitable principles would also apply.

Thus, although the filing date with the MCHR is irrelevant under current law in any event doe to Webb – and even if it were to be relevant the filing deadline would have been measured from the discrimination that occurred in the appeal process, not the date of discharge due to the continuing violations doctrine as set forth above – the charge was timely filed with the Agency with respect to the discriminatory and retaliatory discharge itself, or there is at least a material question of fact on this issue. Respondents' motions would thus also fail for this additional reason as well.

VII. ASSUMING ARGUENDO THAT THE QUESTION OF THE TIMELINESS OF FARROWS PRESENTATION OF HER CLAIM TO THE MISSOURI COMMISSION ON HUMAN RIGHTS WAS A MATTER FOR THE COURT TO GENERALLY CONSIDER EVEN THOUGH IT HAD NOT BEEN PRESENTED TO THE AGENCY, THAT RESPONDENTS HAD NOT WAIVED AND WERE NOT ESTOPPED OR EQUITABLY PRECLUDED FROM RAISING SUCH ARGUMENTS, AND IT WAS DETERMINED THAT FARROW HAD NOT TIMELY PRESENTED HER CLAIM TO THE AGENCY, THE TRIAL COURT WOULD STILL HAVE ERRED IN ENTERING JUDGMENT AGAINST FARROW ON COUNTS I, II, III AND IV OF HER AMENDED PETITION IN THAT THE MISSOURI PUBLIC POLICY OF ENCOURAGING RESORT TO INTERNAL APPEAL PROCEDURES BEFORE TURNING TO STATE AGENCIES OR COURTS WOULD MILITATE IN FAVOR OF A RULE OF LAW TOLLING THE TIME PERIOD FOR REPORTING DISCRIMINATION TO THE MCHR UNTIL AFTER ANY EMPLOYER-PROVIDED INTERNAL APPEAL PROCEDURE HAS BEEN COMPLETED.

Finally, even if the Court were to examine the filing timeframe before the Agency, ignore the evidence indicating that Respondents are stopped from asserting or waived any arguments as to timeliness, ignore the fact that the charge was filed timely in any event, ignore Respondents' role in engendering any delay, and ignore all the foregoing reasons why Respondents arguments are all unavailing for legal and factual reasons, the result should not change. In the instant case, the discrimination that occurred during the internal appeal process was separate, additional discrimination and retaliation that

continued the original acts of discrimination and retaliation of the Respondents. The application of the continuing discrimination doctrine to bring the time frame for raising the charges relating to the original harassment, retaliation, and retaliatory discharge violations of the Respondents is distinguishable from the situation addressed in now-inapplicable, pre-Webb case law which held that the time period in which a charge had to be presented to the MCHR was not tolled by the undertaking of an employer-provided internal appeal. In those cases, the Plaintiffs were not separately discriminated or retaliated in the appeal, but merely sought to toll the period for reporting the original discrimination or harrrassment.

Nonetheless, if this Court determines for any reason to review the question of whether resort to an employer-provided internal appeal should toll the period in which a charge must be presented to the MHCR, it should reconsider the pre-Webb case law. First, the prior cases rejected the policy considerations that dictate that such tolling should occur because of the mistaken belief that jurisdictional considerations were under review. Second, the prior case law overlooked Section 213.101 which directs that the laws be interpreted in a manner to accomplish the purposes of the Chapter. Mo. Rev. Stat. §213.101. This mandate dictates that any filing requirement not be interpreted so as to penalize a plaintiff such as Farrow who seeks an amicable, litigation-less solution by following post-dispute resolution procedures established by her employer. Finally, under the public policy of Missouri, internal appeals are encouraged to allow disputing parties to engage in simple, expeditious and inexpensive procedures that often make possible the settlement of disputes. Internal appeals may allow correction of error, or eliminate or

mitigate damages. Indeed (while it was not the case in the instant matter due to the Respondents' failure to objectively and fairly conduct the internal appeal and their continued discrimination and retaliation), if an organization is given the opportunity quickly to determine through the operation of its internal appeal procedures that it has committed error, it may be able to minimize and sometimes eliminate any monetary injury to the aggrieved party by immediately reversing its initial decision.

To the extent that such an holding was deemed unavailable under prior law, when filing prerequisites were deemed jurisdictional, any such holdings are now open to a new look, and the holding that the scarce resources of our state's administrative agencies should not be imposed upon until and unless an internal appeal remedy fails should be adopted.

VIII. THE TRIAL COURT ERRED IN GRANTING MOTION FOR JUDGMENT IN FAVOR OF RESPONDENT STRANGE ON FARROW'S DEFAMATION CLAIM (COUNT VI IN HER FIRST AMENDED PETITION), IN THAT (A) STRANGE HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, AND (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE.

Standard of Review

As noted above, the standard of review is de novo.

Argument

Count VI of Farrow's First Amended Petition asserts a claim for defamation against Strange for the false and damaging statements Strange made to others regarding Farrow. The claim is properly plead. *See* Diehl v. Fred Weber, Inc., 309 S.W.3d 309, 319 (Mt. Ct. App. 2010) (elements of defamation are: (1) publication; (2) of a defamatory statement; (3) that identifies the plaintiff; (4) that is false; (5) that is published with the requisite degree of fault; and (6) damages the plaintiff's reputation.); *Cf.* [L.F. 31-33] (Count VI of First Amended Petition). The only argument proffered by Strange in the court below was a claim that the count was barred by the statute of limitations.

In Missouri, defamation claims are subject to the two-year statute of limitations contained in Mo. Rev. Stat. §516.140. However, pursuant to Mo. Rev. Stat. §516.100, "the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained" (emphasis added).

Farrow's claim set forth in Count VI of her First Amended Petition alleges that Strange made false and defamatory statements against her. [L.F. 31-32, ¶125-126]. Such statements damaged her by, among other things, causing at least in part, her termination and the confirmation of her termination. [L.F. 32, ¶131]. Her termination occurred on

December 10, 2008. [L.F. 18, ¶64 incorporated by L.F. 31, ¶124]. This was confirmed when Saint Francis finally provide the appeal procedures sometime after January 9, 2009. [L.F. 31, ¶124]. Farrow filed her cause of action on March 18, 2010, well within two years from the date on which she alleges she suffered damage. She properly pled a cause of action.

Strange presented no outside evidence or documents to support his argument that he was entitled to a dismissal in his favor on this claim. Therefore, the Trial Court should have reviewed this matter under the standard for a motion to dismiss --reviewing and treating the facts contained in Count VI of the Amended Petition as true and construing them liberally in favor of Farrow. The Trial Court's contrary ruling is properly reversed. Further, even if the claim were viewed under a summary judgment standard, the evidence proffered by Farrow demonstrating that her termination was based, at least in part, on the statements of Strange, which raises sufficient questions of fact as to the date of damage to preclude summary judgment.

The Trial Court's entry of judgment against Nurse Farrow on her claim for defamation against Strange should be reversed and the matter remanded to the trial court for further proceedings.

IX. THE TRIAL COURT ERRED IN GRANTING STRANGE'S MOTION FOR SUMMARY JUDGMENT ON FARROW'S FALSE LIGHT INVASION OF PRIVACY CLAIM (COUNT VII IN HER FIRST AMENDED PETITION), IN THAT (A) STRANGE HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY

JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, AND (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE.

Standard of Review

As noted above, the standard of review is de novo.

Argument

Count VII of Farrow's First Amended Petition asserts a cause of action against Strange for False Light Invasion of Privacy. Farrow properly stated a claim upon which relief can be granted and asserted the claim within the applicable statute of limitations. Accordingly the Court below erred in entering judgment against Farrow on this Claim and the ruling should be reversed and the matter remanded to the trial court.

"Section 652(E) of the Restatement (Second) of Torts spells out the elements of the tort of false light invasion of privacy as follows: One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." "The difference between false light and defamation is that the latter protects one's interest in his or her reputation, while the

former protects one's interest in the right to be let alone." Meyerkord v. Zipatoni Co., 276 S.W.3d 319, 323 (Mo. Ct. App. 2008), citing Welling v. Weinfeld, 866 N.E.2d 1051, 1057 (Ohio 2007).

In this case, Farrow alleged that in addition to the false statements made against her by Strange, Farrow took affirmative action to reduce her contact with Strange in order to prevent additional confrontations with him [L.F. 11-12, 15, 16, 312], yet on the few occasions when she was unable to avoid him, he continued to make inappropriate and offensive sexual comments to her. [L.F. 312]. Rather than leaving her alone, however, Farrow alleges, Strange made comments holding her out in a false light to others. [L.F. 13]. Farrow alleged she went so far as to transfer to another department of the hospital just to avoid Strange, seeking simply to be left alone, but that Strange made statements holding her out in a false light to her new department as well. [L.F. 15, 312]. Strange's conduct in response to Farrow's continued rejection of him included making false statements about her and also included the removal of Farrow from the PICC line program which she had instituted and managed, and for which she was well known within the Saint Francis community [L.F. 13, 313]. These acts by Strange impaired Farrow's relationship and reputation with others in the Saint Francis community and impeded her efforts to be left alone, disrupting her privacy rights.

The statements and actions of Strange, all properly pled by Farrow, establish the claim of False Light invasion as recognized by Missouri law. As such, Farrow properly pled her cause of action for False Light Invasion of Privacy.

Further, Missouri does not have a specific statute of limitations for the False Light Invasion claim, so such claims are governed by Mo. Rev. Stat. 516.120(4), which provides for a five year statute of limitations. A False Light Claim is an action "for any other injury to the person or rights of another, not arising on contract and not herein otherwise enumerated." Farrow was afforded five years from the time her claim accrued to bring the action. Farrow filed her False Light Invasion of Privacy claim on March 18, 2010, and was well within the five year statutory limitation period. Further, even if the Court were to apply a two year statute of limitations as Strange urged to the court below, for the same reasons as discussed with respect to the defamation count above (pg. 29-30), from which law Strange asked the trial court to borrow, the claim would still be timely.

Strange presented no additional evidence or documents to support his argument that he was entitled to a dismissal in his favor on this claim. Therefore, the Trial Court should have reviewed this matter under the standard for a motion to dismiss, reviewing the facts contained in Count VII of the Amended Petition, treating them as true and construing them liberally in favor of Farrow. However, even if the Summary Judgment standard was for some reason properly applied, the only evidence at bar was that proffered by Nurse Farrow, and there was sufficient questions of fact to preclude judgment at this early stage in any event.

Under the facts presented, the Trial Court erred in granting summary judgment on Count VII in favor of Strange and its ruling is properly reversed and the matter is properly remanded to the Court below.

X. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF STRANGE ON FARROW'S TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY CLAIM (COUNT VIII IN HER FIRST AMENDED PETITION), IN THAT (A) STRANGE HAD MOVED TO DISMISS THE COUNT, NOT FOR SUMMARY JUDGMENT (B) SUCH CLAIM WAS PROPERLY PLEAD AND STATED A CLAIM, AND (C) EVEN IF THE MOTION WAS VIEWED AS ONE FOR SUMMARY JUDGMENT, THE RECORD ESTABLISHED THERE WERE AT LEAST QUESTIONS OF MATERIAL FACT ON ALL ELEMENTS WHICH WOULD PRECLUDE THE GRANT OF SUMMARY JUDGMENT AT THIS EARLY JUNCTURE.

Standard of Review

As noted above, the standard of review is "de novo."

Argument

"The elements of tortious interference with a business relationship are: (1) The Farrow was involved in a valid business relationship; (2) the Respondent was aware of the relationship; (3) the Respondent intentionally interfered with the relationship, inducing its termination; (4) the Respondent acted without justification; and (5) the Farrow suffered damages as a direct result of Respondent's conduct." Clinch v. Heartland Health, 187 S.W.3d 10, 14 (Mo. Ct. App. 2006). Farrow accurately pled facts supporting her claim. [L.F. 34-35]. Farrow's claims against Strange in this count were brought for his acts performed as an individual and for his own purposes [L.F. 7-8]. As such, Strange's general status as an agent of Saint Francis does not invalidate the claim.

See, e.g., Stehno v. Spring Spectrum LP, 186 S.W.3d 247, 252 (Mo. banc. 2006); Topper v. Midwest Division, Inc., 306 S.W.3d 112, 126 (Mo. Ct. App. 2010). The claim was properly plead, states a claim, and judgment against Farrow at this early stage was error. Further, even if the claim were viewed under a summary judgment standard at this early stage, the facts at bar still raise, at least, a question of fact with respect to all issues. This included the facts supporting the capacity in which Strange was being sued. Strange's false statements made for his own purposes as retaliation against Farrow for declining his sexual proposition and reporting him for that wrongdoing, the falsity of the same, and the fact that such statements were at least a partial cause of Farrow's demotion, transfer, limitation of hours and compensation, and ultimate termination raise at least a question of fact.

Under the facts presented, the Trial Court erred in granting summary judgment on Count VIII of the Amended Petition in favor of Strange, is properly reversed, and this matter is properly remanded.

CONCLUSION/RELIEF REQUESTED

For the reasons set forth above, this Court should reverse the Trial Court's Order, Judgment and Decree granting summary judgment on all counts in favor of Respondents Saint Francis and Strange, remand the instant matter back to the Trial Court for the same to proceed or, in the alternative, with direction to the Trial Court to allow Farrow to amend her Petition, and grant such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED,

RIEZMAN BERGER, P.C.

By: _____

Charles S. Kramer, #34416
Joseph D. Schneider, #57484
7700 Bonhomme Avenue, 7th Floor
St. Louis, MO 63105
(314) 727-0101
(314) 727-6458 (fax)

ATTORNEYS FOR FARROW

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served via electronic mail pursuant to applicable court rules, on this _19th__ day of November, 2012, addressed to:

Thomas O. McCarthy, Esq.
McMahon Berger, P.C.
2730 N. Ballas Road, Suite 200
St. Louis, MO 63131

_____

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Rule 84.06 of the Missouri Rules of Civil Procedure, and that based on a word and line count under Microsoft Office Word 2007, this brief, including all footnotes, contains 17,794 words and 1,614 lines.

I also certify that the copy provided to the Court via electronic mail was scanned for viruses and was found to be virus free.

RIEZMAN BERGER, P.C.

By: _____
Charles S. Kramer, 34416
Joseph D. Schneider, #57484
7700 Bonhomme Avenue, 7th Floor
St. Louis, MO 63105
(314) 727-0101
(314) 727-6458 (fax)

ATTORNEYS FOR FARROW